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APPENDIX

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]
15

CLARENCE DEBACKER,
Appellant,

—v.—

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,
Appellee.

APPEAL TO THE SUPREME COURT OF NEBRASKA

FILED OCTOBER 17, 1968
PROBABLE JURISDICTION NOTED FEBRUARY 24, 1969

Supreme Court of the United States

OCTOBER TERM, 1968

No. 662

CLARENCE DEBACKER,

Appellant,

—v.—

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,

Appellee.

APPEAL TO THE SUPREME COURT OF NEBRASKA

INDEX

	Page
Record from the County Court of Dodge County, Nebraska, Juvenile Court	
Petition—filed February 15, 1968	1
Transcript of hearing, March 28, 1968	3
Appearances	3
Testimony of Elga Sanderson	5
Testimony of Wesley C. Homes	6
Colloquy	13
Statement by counsel for the State	13
Order of commitment, March 29, 1968	17
Record from the District Court of Dodge County, Nebraska	
Petition for writ of habeas corpus—filed April 3, 1968	18
Return and answer to writ—April 4, 1968	20

Page

Record from the District Court of Dodge County, Nebraska —Continued

Order dismissing the petition for writ of habeas corpus —April 10, 1968 21

Proceedings in the Supreme Court of Nebraska

Judgment—October 4, 1968 22

Per Curiam Opinion 23

Opinion, McCown, J., joined by Spencer, Boslaugh and Smith, JJ. 23

Opinion, Carter, J., joined by White, C.J. and Newton, J. 32

Opinion, Spencer, J., joined by Smith, J. 42

Order noting probable jurisdiction 45

Order granting motion for leave to proceed in forma pauperis 45

IN THE COUNTY COURT
OF DODGE COUNTY, NEBRASKA

BEFORE RICHARD C. MOREHOUSE,
JUDGE OF THE JUVENILE COURT OF SAID COUNTY

IN THE INTEREST OF CLARENCE J. DEBACKER,
A Child Under Eighteen Years of Age

PETITION—Filed February 15, 1968

Comes now Richard L. Kuhlman, the duly elected, qualified and acting County Attorney in and for Dodge County, Nebraska, and respectfully represents and shows to the court that matters have come to my knowledge which indicate that Clarence J. DeBacker is a delinquent child within the meaning of Section 43-201(4) of the Revised Statutes of Nebraska for 1943, as amended.

That said child is a delinquent child in that he is seventeen years of age, having been born on February 5th, 1951, and that he did on or about the 26th day of January, 1968, in Dodge County, Nebraska, then and there being, did then and there unlawfully, feloniously and knowingly have in his possession and custody a certain false, forged and counterfeited bank check for the payment of money, which is in the words and figures following, to wit:

"FIRST NATIONAL BANK 76-7
Of Fremont 1041

FREMONT, NEBR. Jan. 26, 1968 No. .....

PAY TO THE
ORDER OF O. P. Skaggs $30.00

thirty dollars 00/100 - - - - - - - - - - - - - DOLLARS

FOR food

Donald J. DeBacker
160 Jefferson Rd."

with the intent then and there to utter and publish said false, forged and counterfeited bank check as true and genuine, knowing the same to be a false, forged and

counterfeited bank check, and with the intent then and there and thereby to prejudice, damage and defraud person or persons, body politic or corporate, the said Clarence J. DeBacker, well knowing the same to be falsely made, forged and counterfeited, contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

That Donald J. DeBacker is the father of said child and Josephine A. DeBacker is the mother of said child and that they reside at 160 Jefferson, Fremont, Dodge County, Nebraska, with said minor child.

WHEREFORE, your petitioner prays that a hearing be had at a time and place to be fixed by the court and that the court cause summons to be issued to Donald J. DeBacker, father of said child and Josephine A. DeBacker, mother of said child, and Clarence J. DeBacker, said minor child, notifying them of the time and place of said hearing and that upon said hearing said child be dealt with and cared for according to law and the duty of the State in the premises.

/s/ Richard D. Kuhlman

STATE OF NEBRASKA)
) ss.
COUNTY OF DODGE)

RICHARD L. KUHLMAN, being first duly sworn, on oath deposes and says that he is the duly elected, qualified and acting County Attorney in and for Dodge County, Nebraska; that he has executed the above and foregoing Petition and the facts contained therein are true as he verily believes.

/s/ Richard D. Kuhlman

SUBSCRIBED in my presence and sworn to before me this 15th day of February, 1968.

/s/ Minnie Lewis
Notary Public

[SEAL]

IN THE COUNTY COURT OF DODGE COUNTY, NEBRASKA

BEFORE RICHARD C. MOREHOUSE,
JUDGE OF THE JUVENILE COURT OF SAID COUNTY

Case No. 49

Transcript of Hearing Held at Fremont, Nebraska March 28, 1968—11:30 a.m.

IN THE INTEREST OF CLARENCE J. DEBACKER,
A Child Under Eighteen Years of Age

APPEARANCES

Richard L. Kuhlman, County Attorney in and for Dodge County, Nebraska,

For the State.

Kerrigan, Line & Martin, of Fremont, Nebraska, by Wm. G. Line,

For Clarence J. DeBacker.

HON. RICHARD C. MOREHOUSE, Presiding.

DERROLD S. MCCARDLE,
Official Court Reporter.

[fol. 1] MR. KUHLMAN: If the Court please, this is Case Number 49 entitled In the Interest of Clarence J. DeBacker, A Child Under Eighteen Years of Age. The petition in this matter was filed on the 15th day of February, 1968 and on the same date a summons was issued setting the 26th day of February, 1968 at 1:30 o'clock, p.m. for hearing, and on the 16th day of February, a copy of the summons and the petition was served on Josephine A. DeBacker by personally delivering to her a true and certified copy thereof with all endorsements thereon. And on the same date, Clarence J. DeBacker was served by leaving at his usual place of residence a true and certified copy with all endorsements thereon, and on the 17th day of February, 1968 a copy was served on

Donald J. DeBacker by leaving at his usual place of residence a true and certified copy with all endorsements thereon, by Darold Brand, Deputy Sheriff.

Let the records show that this hearing is being held in excess of twenty-four hours since the service of the summons and copies of the petitions on the parties concerned. The hearing was continued from time to time and was reset for today by agreement between attorney for the State and attorney for the Minor Child.

Does the Minor Child wish to have the petition read [fol. 2] to him at this time?

MR. LINE: I would like to make a preliminary statement, your honor.

First the Defendant objects to the jurisdiction of the court in these proceedings for the reason that the Juvenile Court Act denies the Defendant a right to a jury trial in a case such as this where he is charged with violating the forgery statute of the state and the Defendant believes that the denial of his right to a jury trial violates his rights under the Sixth Amendment to the Constitution of the United States, the right to a trial by jury, and the Defendant demands a jury trial and alleges that the Juvenile Court Act insofar as it proports to deny him a jury trial violates the Sixth Amendment to the Constitution of the United States and the due process clause under the Constitution of the United States.

As far as a reading of the complaint is concerned, the Defendant will waive it because as his counsel I have examined it, and do you understand that this complaint charges you with possession of a forged check?

CLARENCE DEBACKER: Yes.

MR. LINE: Do you have any questions about what is here charged against you?

CLARENCE DEBACKER: No.

MR. KUHLMAN: Does the Juvenile admit that the [fol. 3] facts set out in the petition are true?

MR. LINE: The Juvenile denies the facts set out in the petition.

MR. KUHLMAN: Are you prepared to proceed at this time with the hearing?

MR. LINE: Subject to the objection I dictated into the record, yes.

[fol. 4] ELGA SANDERSON

Called as a witness in behalf of the State and being first duly sworn, testified in chief as follows:

DIRECT EXAMINATION

BY MR. KUHLMAN:

Q Will you give the court your name?
A Elga Sanderson.
Q And where do you live Mrs. Sanderson?
A I live in Wahoo.
Q And were you in employed in Fremont at one time?
A Yes sir.
Q. And where was it that you worked?
A O. P. Skaggs Store on Main Street.
Q And were you working there on the 26th day of January, 1968?
A Yes sir.
Q And what were your duties at that time?
A I was cashier.
Q And what did you do as cashier?
A I checked groceries.
Q And received payment for the groceries?
A Yes.
Q And did you have authority to accept checks that were given for the groceries?
A Yes.

[fol. 5] Q I will hand you what the court reporter has marked for identification as Exhibit "1" and ask you if you know what that is?
A You mean the check?
Q Yes.
A A check made out to O. P. Skaggs for $30.00 for food.
Q Did you receive that check?
A Yes.
Q And on what date did you receive it?
A The day that it is dated?
Q The 26th of January?
A Yes.

Q And where was it that you received this check?
A At the O. P. Skaggs Store on Main.
Q And who was it that brought the check in and presented it to you?
A That boy. (Indicating)
MR. KUHLMAN: Let the records show that she is pointing to Clarence J. DeBacker.
Q And what was said at the time he presented the check, if you know?
A Well, he had a little over fifteen—fourteen dollars worth of groceries and he got the balance back in change and I asked him if it was his father's signature and he told me that it was. So I accepted the check.
[fol. 6] MR. KUHLMAN: That is all.

CROSS EXAMINATION

BY MR. LINE:

Q Had you previously been acquainted with the DeBacker boy?
A Not him personally, no, but his father and mother, yes.
Q You knew both his father and mother?
A Yes.
Q Were you familiar with his father's signature?
A Not exactly, no sir. But I had taken checks from his father.
MR. LINE: That is all.
MR. KUHLMAN: That is all.

[fol. 7] WESLEY C. HOMES

Called as a witness in behalf of the State and being first duly sworn, testified in chief as follows:

DIRECT EXAMINATION

BY MR. KUHLMAN:

Q Would you give the Court your name?
A Wesley C. Homes.
Q And where do you live?

A 1959 Pine, Fremont.
Q And what is your occupation?
A Police Officer, Police Department.
Q And how long have you been with the Fremont Police Department?
A 7 years now.
Q Do you have any special training or special assignment with the Fremont Police Department?
A Yes sir I do.
Q And what is that?
A I am a Detective Sergeant in the Detective Bureau.
Q And how long have you been assigned to the Detective Bureau?
A Two years.
Q And what have your duties consisted of?
A Investigational type of work in criminal matters.
Q Prior to going into the detective bureau, what did your duties consist of?
[fol. 8] A Regular routine police work, traffic and things like this.
Q Did you have any experience in law enforcement prior to the time you joined the Fremont Police Department?
A Yes sir, I did.
Q And what was this?
A I was in the Air Force, in the Air Police Squadron for four years.
Q I don't know if I asked you this, but how long have you been with the Fremont Police Force over all?
A Seven years now.
Q Did you have any contact with Clarence J. DeBacker on the 6th of February, 1968?
A Yes sir, I did.
Q And where did this take place?
A At the police station here in Fremont.
Q Then did you make any record of the time that you talked to him?
A Yes sir, I did.
Q I will hand you what the court reporter has marked as Exhibit "2" and ask you if that is the record that you made at that time?

A Yes sir it is.

Q And what time was it that you talked to him?

A This was at 2:50 p.m. on the 6th of February 1968.

[fol. 9] Q And at that time would you relate what the conversation was that you had with him?

A I introduced myself as a police officer of the Fremont Police Department and I advised him of certain rights which he had.

Q What were these rights?

A That any person in your circumstances has a right to remain silent; that is, you do not have to tell me anything if you do not want to. Do you understand this?

Q What was his answer?

A Yes. Anything that you do tell me, or any other officer, when you visit with me or when you give me a statement, or if you volunteer any information to me, can be used against you in a court of law, do you understand this?

Q And what was his answer?

A Yes. You have a right to have your attorney present while I am talking to you, if you would like. Do you understand this?

Q And what was his answer?

A Yes. If you do not have funds to hire an attorney, you are entitled to have an attorney appointed for you to be present while I am talking to you. Do you understand this?

Q What was his answer?

A Yes. And an appointed lawyer is appointed by the [fol. 10] court, and paid by the county to represent you. Do you understand this?

Q What was his answer?

A Yes. Right now you can waive these rights, if you wish, or you can insist on them. Do you understand this?

Q What was his answer?

A Yes. If you waive these rights now, you can insist on them at any later time. Do you understand this?

Q What was his answer?

A Yes. At this time do you wish you waive your right to remain silent and your right to have an attorney here and visit with me and give me a statement about this matter?

Q What was his answer?
A Yes.
Q Did you then take a statement from him?
A Yes sir I did.
Q I will hand you what the court reporter had marked as Exhibit "3" and ask you if that is the statement that you took from Clarence J. DeBacker?
A Yes sir, this is a carbon copy of it, of the statement which I took from him.
Q What time did you begin the statement?
A I began the statement at 3:08 p.m.
Q What time did you complete it?
A 3:15 p.m., February 6, 1968.
[fol. 11] Q And what was the procedure that you used in taking the statement?
A I would ask him questions and type down what he told me on the typewriter.
Q You sat there at the typewriter filling this out and writing out the statement as you asked him about the matters contained in the statement, is this correct?
A Yes sir.
Q And after you completed the statement did he read the statement over?
A Yes sir he did.
Q And did he make any corrections?
A Not on this statement, no.
Q And after he read it, did he sign this statement?
A Yes sir he did.
Q And was this in your presence that he signed this?
A Yes sir, it was.
Q And then you signed the statement too, in his presence?
A As a witness, yes sir.
Q Did you show him the check, Exhibit "1"?
A Yes sir, I did.
Q And did he identify this as having been written by him?
A Yes sir he did.
MR. KUHLMAN: I would like to offer in evidence, Exhibits "1", "2" and "3". I do have one more founda-
[fol. 12] tion question.

Q I noticed the lapse of time between the waiver of rights at 2:50 p.m. and the beginning of the statement at 3:08. Was there any other statement or was there another statement with reference to another matter that was taken prior to that time?

A Yes sir there was.

Q And off hand, do you know the times of this or do you know what record was kept of the times that it took to take the prior statement?

A There was a record kept, yes. That statement would have been started at 2:55 p.m. and completed at 3:05 p.m. on the same date, February 6, 1968.

Q This is what transpired between the time of the waiver of his rights and taking of the statement, Exhibit "3"?

A Yes sir, it was.

MR. LINE: Wes, were either one of Clarence's parents present when he made this statement?

THE WITNESS: His father was there but he wasn't in the room, no sir.

MR. LINE: Did he know his father was there or did you tell him his father was there?

THE WITNESS: He knew his father was there.

MR. LINE: How do you mean he knew his father [fol. 13] was there?

THE WITNESS: I think he probably talked to him prior to coming in to see me.

MR. LINE: Did you see him talk to him before that?

THE WITNESS: No, I can't say that I did.

MR. LINE: You don't know whether he knew his father was there or whether he had talked to his father?

THE WITNESS: I think he knew his father was there because he talked to him. His father came in the room right afterwards and sat there with us in the room.

MR. LINE: What I am asking you, is before the statement was given. Do you know whether he knew his father was there?

THE WITNESS: I don't know, no.

MR. LINE: And you don't know whether he talked to his father or knew his father was around before he gave you this statement?

THE WITNESS: I don't know if he knew that.

MR. LINE: Did you tell him or anything that his father was around?

[fol. 14] THE WITNESS: No, he never asked.

MR. LINE: Did he ask about talking to any one of his parents before he talked to you?

THE WITNESS: No, he didn't.

MR. LINE: Had you made any effort to get in contact with either one of his parents before you took the statement from him?

THE WITNESS: I had talked to his father before, prior to this, but on this particular day, no.

MR. LINE: So you made no effort to tell either one of his parents that you were going to take a statement from him concerning this check?

THE WITNESS: Mr. DeBacker knew that I was going to talk to him.

MR. LINE: You had told Mr. DeBacker that you were going to talk to his son?

THE WITNESS: He knew when he came in to visit with me that we were going to visit with his son.

MR. LINE: Did you tell Mr. DeBacker that you were going to talk to his son about a forged check?

THE WITNESS: He knew this, yes sir.

MR. LINE: That is not the question I asked you. Did you tell him?

[fol. 15] THE WITNESS: Not on this particular day no.

MR. LINE: Did you ever tell his father prior to your taking a statement from Clarence that you were going to take a statement from him concerning this check?

THE WITNESS: Yes sir, I did.

MR. LINE: When?

THE WITNESS: I would have to look back into the report to see the date on this.

MR. KUHLMAN: Could I hand him this report to refresh his recollection?

MR. LINE: Yes.

THE WITNESS: This would have been on the 6th of February, 1968 at 2:20 p.m.

MR. LINE: This statement shows it was taken on February 5th—excuse me. Strike that. I misread the date of birth. You say that on February 6th at what time—2:20 p.m.?

THE WITNESS: Yes.

MR. LINE: You informed his father of what?

THE WITNESS: That I would be talking to his son.

MR. LINE: Did you tell him what about?

THE WITNESS: About these checks.

[fol. 16] MR. LINE: Where did you tell him that?

THE WITNESS: That would have been at the police station.

MR. LINE: Was his son there then?

THE WITNESS: No, not at that time.

MR. LINE: What did he say?

THE WITNESS: He said I could talk to him.

MR. LINE: Where was Clarence then?

THE WITNESS: I don't know. I don't know where Clarence was.

MR. LINE: How did he get to the police station—did you take him there?

THE WITNESS: I think I probably asked him to come down to the station.

MR. LINE: Do you know whether he and his father came to the station together or anything like that?

THE WITNESS: I don't remember, no sir.

MR. LINE: The Defendant objects to the admission of Exhibit "3", his statements, for the reason that the statement says that is might be used against the Defendant in a criminal proceedings, and it now is being introduced in what is denominated by the Juvenile Court Act as a civil proceedings. There is no showing that the De-

[fol. 17] fendant, a 17 year old boy, made a competent or intelligent waiver of counsel. No showing that he had the opportunity to consult with his parents, and no showing that the statement was a voluntary one. The same objection is made to Exhibit "2". And no proper and sufficient foundation laid for the admission of Exhibit "1", the check.

MR. KUHLMAN: I would like to ask two more questions.

Q Was the statement, Exhibit "3", voluntarily given to you, were there any threats made in order to obtain this Exhibit "3"?

A No, there wasn't.

Q As the statement was voluntary?

A Yes, it was.

Q And did Clarence ask at any time to talk to his parents, to either of his parents, either before or during the time you were taking his statement?

A No, he didn't.

MR. KUHLMAN: I will renew my offer of Exhibits "1", "2", and "3".

MR. LINE: The same objection.

THE COURT: I will overrule the objections.

Q In which county is the O.P.Skaggs Store on Main Street?

[fol. 18] A Dodge County.

Q And what are his parents' names?

A Donald and Josephine DeBacker.

MR. KUHLMAN: That is all.

MR. LINE: I have no further questions of this witness.

(Witness excused)

[fol. 19] MR. KUHLMAN: It is stipulated between the State and Clarence DeBacker, A Child Under 18 Years of Age, that if Donald J. DeBacker, his father, were called to testify they he would testify substantially as the statement given to Officer Homes which has been identified as Exhibit "4".

MR. LINE: That stipulation is satisfactory subject to my original objection to the jurisdiction of the Court. I don't want this to be considered as waiving any constitutional rights.

MR. KUHLMAN: This is all I have with reference to the charge itself. As far as disposition, after the Court has made his determination of delinquency I would like to be heard some further at that time. For the purpose of the hearing on determining whether or not he is a delinquent child the State will rest.

MR. LINE: The Defendant has no evidence.

THE COURT: You want to be heard further after the finding?

MR. KUHLMAN: Yes. It has to do with disposition.

THE COURT: I will overrule the objection to the jurisdiction of the court made by the minor child and find that Clarence J. DeBacker is a delinquent child.

MR. KUHLMAN: Clarence is one of several children [fol. 20] that were given to Catholic Charities in a divorce action at the request and instance of the father a number of years ago and Clarence at that time was too old to adopt. His brothers and sisters were all adopted out. He was placed in Boys Town at one time and in 1967 he ran away and was involved in stealing cars and they felt that they could not control him and felt that they should return him to court and let the court return him to his parents or whatever the court saw fit to do. This was done. He was returned to court and the court returned the custody of Clarence to the parents and since that time Clarence, which was a little less than a year ago, Clarence has been involved in a number of scrapes with the law. On August 4, 1967 he was fined $26.00 and costs in Justice Court on a charge of reckless driving. On August 17, 1967, he was fined $11.00 and costs in Police Court under a charge of disturbing the peace. October 9, 1967, he was fined $46.00 and costs in Justice Court on a reckless driving charge. On February 17, 1968, he was fined $1.00 and costs in Police Court for an improper muffler. On March 2, 1968 he was fined $11.00 and costs in Police Court for speeding. On the 2nd of March, 1968 he was fined $6.00 and costs in Police Court for failure to stop at a stop sign. On March 2, 1968 he was fined $21.00 and costs in Police Court for speeding 50 miles an hour in a 25 mile [fol. 21] an hour zone. I don't have the records here just in the last fifteen to twenty days, he was in Justice Court again for reckless driving and was fined and was sentenced to ten days in jail. He was at that time sent to jail to lay out the jail sentence and the balance of the fine after having laid out the jail sentence. He was arrested also on a charge of auto theft which was changed by me to a petit larceny complaint and the matter was continued in the hope that Clarence might get himself straightened out.

This auto theft occurred on the—he was arrested on the 17th of July 1967 on this and this case I believe is still pending in the court as a petit larceny complaint. And assault and battery complaint was filed against him which was later amended to an assault case. A menacing threats case is still also pending in this court on the criminal docket. He has an improper left turn charge pending in Police Court which has been continued by the court indefinitely. It was set for hearing on the third day of January, 1968 and at that time the court continued the case indefinitely, and there has been no disposition since that time.

I think that for the sake of Clarence that he needs a closer supervision than his parents can ever give him. And unless he is given that close supervision, the next thing he will graduate to a criminal complaint and prob- [fol. 22] ably rather than be sent to Kearney or some institution such as this he would go to the Men's Reformatory in Lincoln. His attitude seems to be that he will do just as he pleases. He has indicated a utter disregard for all the traffic laws and this is getting into the area now of other criminal laws. Where he begins forging checks in order to get what he wants. I don't have available to me the school records. This young man does have a relatively high I.Q. and it seems a terrible waste of humanity to let this thing go on and take the course that it is apparently starting to take. He is going to end up in the penitentiary and it will be a waste of this young man's life. The only thing the court can do here is to commit this young man to the Boy's Training School at Kearney where he can receive the close supervision and guidance that he needs in order to see him through this area.

MR. LINE: First, may it please the Court, I would like to make an objection for the record to Mr. Kuhlman's reference to other offenses, because they are not contained in the complaint filed against the Defendant and I would like to have a ruling on that objection and after the Court's ruling I will make a brief statement on the Defendant's behalf.

THE COURT: I will overrule the objection.

[fol. 23] MR. LINE: May it please the Court. I would like to suggest that since Clarence has been at Boy's Town that consideration be given to placing him back there because the situation at Kearney, which we all read about in the papers and there has been so many statements in the public press lately, makes me wonder whether it is an appropriate place to send any child, no matter what he has done.

THE COURT: What is the policy down there on a boy that has been there once, will they take him back again?

MR. KUHLMAN: Perhaps with reference to his going back to Boy's Town, I doubt very seriously they would take him back, because at the time they turned him back to the court here the Catholic Charities turned him back because they were no longer able to control him with the situation that they had there at Boy's Town. I feel it would be a mistake to send Clarence to Boy's Town because I don't feel that they can give him the close supervision this young man needs at this time.

MR. LINE: Father Farrald, the guidance counselor, indicated to me two or three months ago he would be interested in working with Clarence again. Whether or not he would feel this way at this time, I can't say for certain.

[fol. 24] THE COURT: I am going to order Clarence J. DeBacker, order his commitment to the Boy's Training School at Kearney, Nebraska, but I suppose he will have to complete the jail sentence that he is in the Dodge County Jail for now.

MR. KUHLMAN: This is up to the court.

THE COURT: I will commit him immediately to the Boy's Training School at Kearney.

- The End -

IN THE COUNTY COURT OF DODGE COUNTY, NEBRASKA

BEFORE RICHARD C. MOREHOUSE,
JUDGE OF THE JUVENILE COURT OF SAID COUNTY

IN THE INTEREST OF CLARENCE J. DEBACKER,
A Child Under Eighteen Years of Age

ORDER—March 29, 1968

Now on the 28th day of March, 1968, this matter came on for hearing on the petition filed herein, said minor child being present in court with his attorney, William G. Line. The record discloses that due and legal service of summons, and a copy of the petition, were had on said minor child and his parents more than twenty-four hours prior to the hearing and that the date and time of the hearing was arranged by agreement of counsel for the State and said minor child.

Said minor child, through his attorney, objected to the jurisdiction of the court for the reason that said minor child by statute is not entitled to a trial by jury and said minor child, through his attorney, made a demand for trial by jury on the matter, which was overruled and refused by the court.

Said minor child, through his attorney, waived the reading of the petition, said minor child indicating that he understood the allegations set out in the petition. Said minor child, through his attorney, denied the facts set forth in the petition.

Whereupon witnesses were sworn and evidence adduced and at the conclusion thereof the court finds that Clarence J. DeBacker is a delinquent child within the meaning of Section 43-201(4) of the Revised Statutes of Nebraska for 1943, as amended, and further that he should be committed to the Department of Public Institutions and that he should be taken by the Sheriff of Dodge County, Nebraska, to the Boys' Training School at Kearney, Nebraska.

IT IS THEREFORE ORDERED that Clarence J. DeBacker is a delinquent child and that he be and hereby is committed to the Department of Public Institutions of the

State of Nebraska and that he shall be taken by the Sheriff of Dodge County, Nebraska, to the Boys' Training School at Kearney, Nebraska, and there turned over to the Department of Public Institutions.

Signed this 29th day of March, 1968.

/s/ Richard C. Morehouse
Juvenile Judge

[SEAL]

IN THE DISTRICT COURT
OF DODGE COUNTY, NEBRASKA

CLARENCE J. DEBACKER, PETITIONER

vs.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS—
Filed April 3, 1968

Petitioner shows to the court:

1. Petitioner is held in respondent's custody by virtue of order of commitment, a copy of which is marked Exhibit A and is attached hereto and is incorporated by reference herein, issued out of the County Court of Dodge County, Nebraska, under the provisions of the Nebraska Juvenile Courts Act, Sections 43-201 to 43-220, RRS Supp. 1965.

2. Petitioner is unlawfully deprived of his liberty as the proceedings leading to his commitment violated his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States in the following particulars:

A. Section 43-206.03 RRS Supp. 1965 violates the due process clause of the Constitution in that said section requires the juvenile court to make a finding and adjudication that petitioner violated a law of this state on a perponderence of the evidence only and does not require

that a finding that petitioner violated a law of this state be based upon evidence sufficient to convince the trier of fact beyond a reasonable doubt.

B. Said section 43-206.03 prevents the application of the protective rules of criminal procedure and requires the application of the vague and uncertain standard of "the customary rules of evidence in use in civil trials without a jury in the District Court."

C. Said Section 43-206.03 denies petitioner a jury trial of the issue of his alleged violation of a law of this state, in this case a felony, in violation of petitioner's right to a jury trial under the Sixth Amendment to the Constitution of the United States.

3. Petitioner is deprived of his liberty under the Fourteenth Amendment of the Constitution of the United States when his right to a jury trial and the protective procedures of the criminal code are left to depend on the uncontrolled discretion of the prosecutor as to whether petitioner should be proceeded against in juvenile court or should be informed against in District Court under the provisions of the code of criminal procedure.

CLARENCE J. DEBACKER,
Petitioner,

By KERRIGAN, LINE & MARTIN
His Attorneys

STATE OF NEBRASKA)
) ss
COUNTY OF DODGE)

Clarence J. DeBacker, being first duly sworn, deposes and says that he has read the foregoing petition, knows the contents thereof, and the facts therein contained are true as he verily believes.

/s/ Clarence J. DeBacker

Subscribed and sworn to before me this 3 day of April, 1968.

/s/ W. G. Line
[SEAL] Notary Public

IN THE DISTRICT COURT
OF DODGE COUNTY, NEBRASKA

CLARENCE J. DEBACKER, PETITIONER

- vs -

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,
RESPONDENT

RETURN AND ANSWER TO WRIT—Filed April 4, 1968

Homer Branard, for answer and return to said writ, states that Clarence J. DeBacker, on the 29th day of March, 1968, was placed in his custody as sheriff of said county, by virtue of an order of the Juvenile Judge, a copy of which is marked Exhibit "A" and is attached hereto and incorporated by reference herein, and that he now holds the said Clarence J. DeBacker in custody by virtue of said order for transportation to Kearney, Nebraska, there to be turned over to the Department of Public Institutions in pursuance of the order. In obedience to the writ of habeas corpus issued herein he now produces the body of the said Clarence J. DeBacker before the court to be dealt with according to law.

For further answer and return to said writ, said Homer Brainard does expressly deny that Section 43-206.03, Reissue Revised Statutes of Nebraska Supplement of 1965 violates the Sixth and Fourteenth Amendments to the Constitution of the United States in any way, but that said Statute is a valid and subsisting statute in all respects and that the detention of the said Clarence J. DeBacker is in all respects lawful.

Dated this 4th day of April, 1968.

/s/ Homer Brainard
Sheriff of Dodge County,
Nebraska

IN THE DISTRICT COURT
OF DODGE COUNTY, NEBRASKA

CLARENCE J. DEBACKER, PETITIONER

- vs -

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,
RESPONDENT

ORDER—April 10, 1968

Now on this 10th day of April, 1968, this matter came on for hearing, the Petitioner appearing by William G. Line, his attorney, and the Respondent appearing by Richard L. Kuhlman, Dodge County Attorney.

Evidence was adduced and the court finds that the petitioner's petition filed herein should be dismissed.

IT IS THEREFORE ORDERED that the petitioner's petition filed herein be and hereby is dismissed.

Signed this 10th day of April, 1968.

BY THE COURT:

s [Illegible]
District Judge

IN THE SUPREME COURT OF NEBRASKA

No. 36989

CLARENCE J. DEBAKER, APPELLANT

v.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska, APPELLEE

Appeal from the District Court for Dodge County

JUDGMENT—October 4, 1968

This cause coming on to be heard upon appeal from the district court of Dodge county was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and it hereby is, affirmed; that appellee recover of and from appellant his costs herein expended, taxed at $; for all of which execution is hereby awarded and that a mandate issue accordingly.

Opinion Per Curiam

McCown, Judge, joined by Spencer, Boslaugh and Smith, Judges. Carter, Judge, joined by White, Chief Justice and Newton, Judge. Spencer, Judge, joined by Smith, Judge.

PAUL W. WHITE,
Chief Justice

IN THE SUPREME COURT OF NEBRASKA

Heard before White, C. J., Carter, Spencer, Boslaugh, Smith, McCown, and Newton, JJ.

PER CURIAM.

The petitioner was found to be a delinquent child and ordered committed to the Boys' Training School at Kearney. The facts alleged as the basis for the charge of delinquency constituted the crime of forgery if he had been charged under the general criminal laws. Petitioner asserts that section 43-206.03, R. S. Supp., 1967, a part of the Juvenile Court Act, is unconstitutional in that it denies him the right of a jury trial, and applies a "preponderance of the evidence" rule rather than a "beyond a reasonable doubt" rule to the adjudication of delinquency.

Four judges are of the opinion that the statute is unconstitutional as challenged. Three judges are of the opinion that it is constitutional. Article V, Section 2, Constitution of Nebraska, provides in part: "No legislative act shall be held unconstitutional except by the concurrence of five judges."

The petition for habeas corpus here was dismissed by the district court. That judgment must, therefore, be affirmed.

AFFIRMED.

McCOWN, J., joined by SPENCER, BOSLAUGH, and SMITH, JJ.

The constitutional rights of juveniles and the developing ramifications of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (May 15, 1967), are at issue here. By habeas corpus, the petitioner, a 17-year-old minor, sought his discharge from the custody of the Dodge County sheriff under an order committing him to the Boys' Training School of Kearney. The denial of a jury trial and the statutory application of a preponderance of the evidence rule rather than the beyond a reasonable doube rule are the basis of the constitutional challenge.

The county attorney filed a petition in the Dodge County court within its juvenile jurisdiction charging that Clarence J. DeBacker, a minor 17 years of age, was a delinquent child within the meaning of section 43-201(4), R. S. Supp., 1967. The basis for the charge of delinquency was the possession of a forged check with intent to utter it as genuine. The facts alleged in the petition constituted the crime of forgery under section 28-601(2), R. R. S. 1943, if he had been charged under the general criminal laws. The penalty for violation of that section is imprisonment in the Nebraska Penal and Correctional Complex not exceeding 20 years nor less than 1 year and a fine not exceeding $500.

The check bore the signature "Donald J. DeBacker," petitioner's father, and was given to the O. P. Skaggs store for groceries on January 26, 1968. The check was passed by the petitioner who said his father's signature was on the check. Petitioner's father and mother were known to the clerk at the store who had taken checks from petitioner's father previously. Petitioner, after full and complete Miranda warnings, gave a statement to the police in which he stated that his mother was determined she was going to have a birthday party for the petitioner and needed more food. His mother was very jittery and told petitioner to sign his father's name to a check blank which she had given him. Petitioner's mother assured him that it was all right for him to go ahead and write the check so he did so, signing his father's name. Petitioner and his mother went to the store and petitioner went in and got groceries and approximately $10 change. It was stipulated that petitioner's father would testify that his wife could not write checks on his account; that he told the store the check was not signed by him; that his signature did not appear on the check; and that he told the police perhaps his wife and petitioner may have had something to do with the check.

Before the proceedings commenced, petitioner objected to the jurisdiction of the court because of the denial of his right to a jury trial. At the conclusion of the evidence, the county judge, as judge of the juvenile court, overruled the objection to the jurisdiction of the court, and found

that petitioner was a delinquent child. Thereafter, the court ordered the petitioner committed immediately to the Boys' Training School at Kearney. Habeas corpus relief was denied by the district court, and this appeal followed.

Some background is necessary to provide a frame of reference for the constitutional issues raised here. Until the turn of the century, juveniles in the United States were generally treated as adults insofar as the criminal law was concerned, and, of course, had the same constitutional rights as adults. With the advent of juvenile court acts, which began in Illinois in 1899, the system of juvenile courts spread to every state in the union. The theory was that for their misconduct, children should not be handled, treated, or punished in the same fashion, nor under the same processes and procedures, as adult criminals. The theory also was that a child should not be determined to be guilty or innocent of criminal conduct and there should be a broad range of rehabilitation procedures. In brief, the juvenile court procedures were regarded as being beneficial to the child, and intend to remove and discard the technicalites of substantive and procedural law for adults. Over 40 states have upheld the constitutionality of juvenile court laws erected on such concepts. Nebraska was one. See State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N. W. 804 (1913). In that case, our court took the same approach as other states, and based the validity of the Juvenile Court Act on the doctrine of parens patriae. The state, through the juvenile court, was merely performing the duty of seeing that the child was properly cared for. The problems involved in denying to a juvenile the constitutional protections afforded to an adult charged with crime were avoided simply by declaring that the juvenile court procedures was civil rather than criminal in nature. This court said in State ex rel. Miller v. Bryant, *supra*: "The law is not of a criminal nature. The purpose of the criminal law is to punish, while the juvenile law is to help the child, and restraint is only imposed as a means of such help."

Some of the juvenile court acts made the jurisdiction of the juvenile court exclusive, and some provided for a

waiver by the juvenile court to the adult criminal court. The Nebraska pattern created a concurrent jurisdiction as to criminal misconduct, and enabled the county attorney to determine whether to file an action under the general criminal laws of the state, or a delinquency proceeding in the juvenile court. See, State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101; Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240.

At its inception in 1905, and until 1963, the Nebraska Juvenile Court Act, with respect to jury trials in juvenile court, provided: "In all trials under this act where a delinquent child is charged with crime, any person interested therein may demand a jury or the judge of (on) his own motion may order a jury to try the case; * * *." See Laws 1905, c. 59, s. 2, p. 306, now s. 43-202, R. R. S. 1943.

This specific provision for a jury trial was effectively eliminated by this court. We held that charging a child with being delinquent did not charge him with a crime, even though the facts alleged would have constituted a specific charge of crime if made against an adult. Such charges, we said, merely set forth the necessary facts showing him to be delinquent. See Laurie v. State, 108 Neb. 239, 188 N. W. 110.

This position was reaffirmed on many occasions. See State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N. W. 2d 72 (1963). It should be noted that in the Hans case, Chief Justice Simmons specifically dissented from that part of the court's opinion that approved the denial of a jury trial. He stated in that dissent: "By the device of charging that the accused is a delinquent and not a criminal, a jury trial is denied. The substance of the offense and not the form of the charge should control. The liberty and reputation of a person is involved. Youth as well as maturity are entitled to the benefits of the jury system. The statute and the Constitution so provide."

In 1963, in an extensive recodification of the Juvenile Court Act, the provision for jury trials was removed. Section 43-206.03, R. S. Supp., 1967, now provides in part: "(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules

of evidence in use in civil trials without a jury in the district courts.

"(3) At the hearing the court shall first consider only the question of whether the minor is a person described by section 43-201. This shall be known as the adjudication. After hearing the evidence on said question, the court shall make a finding and adjudication entered in the minutes based on the preponderance of the evidence, whether or not the minor is a person described by section 43-201.

"(4) If the court shall find that the child named in the petition is not within the provisions of section 43-201 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make and enter its finding and adjudication accordingly, designating which subdivision or subdivisions of section 43-201 said child is within; the court shall then proceed to an inquiry into the proper disposition to be made of the child."

Section 43-201, R. S. Supp., 1967, now establishes four different subdivisions: Dependent child, neglected child, delinquent child, and a child in need of special supervision.

This pattern was only typical of what happened in all the states. Form swallowed substance, and semantics disposed of the constitutional rights of juveniles charged with being "delinquent." The basic assumption that an adjudication of "delinquency" was in no sense criminal but only civil was reflected by both courts and legislatures. The result was that a child charged in juvenile court with misconduct which would have been criminal if he had been an adult became, in effect, a constitutional nonperson. And then came Gault!

In In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, it was stated: "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."

The Gault case, which applied the due process standard to juvenile proceedings involving the adjudication of delinquency, was foreshadowed in Kent v. United States, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). That case held that the hearing in juvenile court to waive the "exclusive" jurisdiction of the juvenile court to the adult criminal court under a District of Columbia statute must measure up to the essentials of due process and fair treatment.

In re Gault has spawned an almost unending volume of comment. The holding in Gault refers only to the adjudicatory stage of the juvenile court process—the adjudication of delinquency where commitment to a state institution may follow and when the proceedings may result in incarceration in an institution of confinement. It does not require that juveniles be handled as adults, nor does it affect the dispositional process after an adjudication of delinquency. It clearly does not apply to procedures involving neglected or dependent children, nor to any proceeding except those by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to the area of adjudication of delinquency circumscribed by Gault, it does require that the process must meet the standards of due process. We believe that an implicit foundation for the holding in Gault is the conclusion that juvenile proceedings, to declare a juvenile "delinquent" as a result of his own misconduct are at least sufficiently criminal in nature that the constitutional rights involving due process in criminal cases must be applied. The due process requirements spelled out in Gault do not pass upon the issue of whether or not the right to a jury trial is a fundamental part of that due process. The problem here is whether the right to a jury trial is an essential part of due process in the area of adjudication of delinquency outlined by Gault.

So far as present research indicates, since the Gault decision, three states have passed upon the issue of whether a juvenile has a constitutional right to a jury trial in juvenile court at the adjudicatory stage of the juvenile court process of determining delinquency. Two

of these cases have denied such right and one has upheld it on the basis of a statutory interpretation.

Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A. 2d 9 (Sept. 15, 1967), held that denial of a jury trial to a juvenile on charges of rape, assault with intent to ravish, assault and battery, and indecent assault was not violative of the juvenile's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. The court relied heavily on the fact that the United States Supreme Court had never held that the right to trial by jury was a fundamental part of due process imposed upon the states through the Fourteenth Amendment. The court also conceded that the change of the name of the offense from "rape" to "delinquency" did not of itself affect the constitutional right of the accused to a trial by jury.

Estes v. Superior Court, 73 Wash. 2d 272, 438 P. 2d 205 (March 5, 1968), held that jury trial in a juvenile delinquency proceeding was not a constitutional requisite. The Washington court relied upon the Johnson case and also concluded that Gault should not be considered as a mandate incorporating the right to a jury trial within the fundamental essentials of due process, and also reaffirmed its previous conclusion that the Washington constitutional requirements as to trial by jury were applicable only to criminal prosecutions, and that juvenile court proceedings should not be considered criminal.

Peyton v. Nord, 78 N. M. 717, 437 P. 2d 716 (Feb. 26, 1968), held that under the New Mexico juvenile court statute, a juvenile charged with violation of a state law is entitled to a trial by jury in juvenile court if there is no certification to district court and if the offense is one which would be triable by a jury if committed by an adult.

All of these cases were decided prior to Duncan v. Louisiana, ___ U. S. ___, 88 S. Ct. 1444, ___ L. Ed. 2d ___, decided May 20, 1968.

In Duncan, for the first time, the Supreme Court held that the right to jury trial in serious criminal cases is a fundamental right, and hence must be recognized by the states as a part of their obligation to extend due process of law to all persons within their jurisdiction. While

Duncan avoids any clear-cut holding as to what will constitute a serious criminal case, it does indicate quite obviously that the dividing line may depend upon the maximum possible time of imprisonment provided as a penalty. It also indicates that the present federal rule of 6 months may be the appropriate measure.

In re Whittington was disposed of on the same date on which Duncan was decided. Whittington involved the issues of the right to trial by jury and standards of proof in adjudications of juvenile delinquency. Because of an intervening order binding the juvenile over for trial as an adult, the Supreme Court did not pass on the issues. It did, however, vacate the judgment and remand the cause to the Ohio court for consideration in light of Gault. See In re Whittington, —— U. S. ——, 88 S. Ct. 1507, —— L. Ed. 2d —— (May 20, 1968).

If Gault is ultimately interpreted as meaning that any juvenile court proceeding to determine "delinquency" is a "serious" case because the child might be subjected to the loss of his liberty for more than 6 months, then every adjudication of juvenile delinquency would give rise to a constitutional right to a jury trial. Some language in Gault might be so interpreted. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." In re Gault, *supra*, p. 36.

However, Gault did not impose the requirement of a jury trial as a part of due process in adjudications of delinquency. This omission might rest on two obvious facts. Duncan had not yet been decided, and, in Gault, the crime involved, if committed by an adult, could have resulted only in a fine of $5 to $50 or a jail sentence of not more than two months. It was, therefore, not a "serious" criminal case, and an adult would not have been entitled to a constitutional right to trial by jury, even under Duncan. Therefore, Gault could also be interpreted as meaning that even though adjudications of delinquency are at least partially criminal in nature, a juvenile is only entitled to the same constitutional right to jury trial as an

adult would be for the same actions in an adult criminal court.

The length of possible punishment may be an "objective" basis for dividing serious and petty crimes in the general criminal courts. There individual crimes are set out in dozens of variations and the punishments are applied to the specific acts constituting the individual crime. Under the Nebraska Juvenile Court Act, a "delinquent" is now defined as: "any child under the age of eighteen years who has violated any law of the state or any city or village ordinance." S. 43-201, R. S. Supp., 1967. The complete range of disposition permitted by the Juvenile Court Act may be applied to the single category of "delinquent." A correlation between juvenile court and adult criminal court as to the constitutional right of trial by jury, based solely on possible length of "punishment," presents difficult alternatives. Faced with such alternatives, we see no present justifiable reason to declare that all proceedings to determine that a child is delinquent under the Juvenile Court Act are "serious criminal cases" giving rise to a constitutional right to trial by jury under the due process clause.

Four judges, a majority of this court, are of the opinion that a juvenile charged with violation of a state criminal law as the basis for an adjudication of delinquency is entitled to a constitutional right to a trial by jury in juvenile court if the offense is one which would give rise to a constitutional right to trial by jury if committed by an adult and triable in an adult criminal court. To the extent the provisions of section 43-206.03, R. S. Supp., 1967, are in conflict, we believe they are unconstitutional. This conclusion is also reinforced by the case of Nieves v. United States, 280 F. Supp. 994, decided March 5, 1968. This constitutional right, of course, may be waived, although special problems may arise with respect to waiver. See In re Gault, *supra*.

Four judges are also of the opinion that a finding of delinquency, for misconduct which would be criminal if charged against the adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged. See In re Ur-

basek, 38 Ill. 2d 535, 232 N. E. 2d 716; United States v. Costanzo, 395 F. 2d 441 (4th Cir.). To the extent that those provisions of the Juvenile Court Act, section 43-206.03, R. S. Supp., 1967, incorporating a preponderance of the evidence standard for delinquency proceedings are in conflict, we also believe they are unconstitutional and void.

CARTER, J., joined by WHITE, C. J., and NEWTON, J.

This is an appeal from the denial of a writ of habeas corpus. The petitioner is a 17-year-old boy who sought a release from the custody of the county sheriff under an order committing him to the Boys' Training School in Kearney, Nebraska, as a juvenile delinquent. It is the contention of the petitioner that upon demand, which was made, he is entitled to a trial by jury and to have the issue of his delinquency determined under the rule in criminal cases requiring a finding of guilt beyond a reasonable doubt.

The first Juvenile Court Act was enacted in this state in 1905. The history of the act is set out in State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101. Prior to 1963, the act and the amendments thereto did not provide for a trial by jury except where a delinquent minor child is charged with a crime. In 1963, the act was amended to provide in part: "(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts." S. 43-206.03, R. S. Supp., 1967.

In a delinquency case such as the one before us in which a jury was demanded and denied, this court said: "The act itself makes no provision for a trial by jury except where a delinquent child is charged with a crime. The complaint was intended to charge, and did charge, the boy with being a dependent, neglected and delinquent child. Dependent and neglected in this; that said Alton Laurie * * * has violated the laws of the state; * * * and was repeatedly guilty of operating a motor car in viola-

tion of law. It is evident the specific charges in the complaint of law violation were not made with the intent of charging him with crime, but to set forth and state the facts showing him to be a dependent, neglected and delinquent child. The statute defines dependent, neglected and delinquent child, and to bring the case within the statutory provision, it was necessary to make these allegations, and without such, or similar allegations, the petition would be subject to attack. It is not enough that the petition charge that the boy was a dependent, neglected and delinquent child, but it must go farther and set forth facts showing that he was such a child, and until such a petition was filed he would be uninformed of what he would have to meet. The petition in such cases must inform the defendant of the charge he is to meet, to enable him to prepare for his trial. And an examination of the petition brings us to the irresistible conclusion that the charge against the boy was that of delinquency. A commitment to the industrial school upon such a charge is not a conviction of a crime, or a commitment to a penal institution." Laurie v. State, 108 Neb. 239, 188 N. W. 110. In the foregoing case, Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422, is quoted with approval in part as follows: " 'The proceeding is not one according to the course of the common law in which the right of jury by trial is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the Constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated by such a law—none whatever; but rather the placing of them under the natural restraint, so far as practicable, that should be, but is not, exercised by parental authority. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right. It is for their welfare and that of the community at large. The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situa-

tion. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered.'" See, also, Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267. The foregoing holdings of this court have remained the law of this state to the present time.

The original pleading filed in the delinquency proceeding is labeled a petition and alleges that the petitioner in the present case is a delinquent child within section 43-201(4), R. S. Supp., 1967, in that he was in the possession of a forged, false, and counterfeited bank check. I point out that petitioner was not charged with a crime, he was not and could not be tried on a criminal charge, no punishment for a crime was or could be inflicted, and the presumption of innocence as to the commission of crime is still applicable to him. It is argued here that a finding of delinquency is in practicable effect a conviction for crime in that some persons have so construed it in transactions in the market place. But there is no evidence that any court has placed any such controlling construction upon it. It cannot be logically argued that because some persons may incorrectly choose to treat the proceeding as criminal in nature it then has the effect of making it so and thus affords a basis of unconstitutionality.

The position of the members of the court who would reverse and remand place the Juvenile Court Act in an unconscionable situation even if amended to conform to their views. A delinquent child may be committed to the training school whether or not the evidence points toward the commission of a crime by the juvenile. In either event, the juvenile may be committed until his conduct has been adequately corrected or until he has been placed in a suitable environment, but in no event beyond the age of 21 years.

In other words, the corrective process is the same whether or not the supporting evidence indicates that the commission of crime may be involved. In requiring a jury trial when demanded, if there is evidence that some criminal act may be involved, the real purpose of the Juvenile Court Act is destroyed. It tosses the juvenile into a trial by jury where he is tried for all intents and purposes as a criminal when this is one of the things the Juvenile Court Act purports to eliminate. Instead of a hearing in juvenile court largely in the procedure of a court of equity, he is given a formal trial before a jury where the main issue will be whether or not he has committed a crime. This defeats the main purpose of the Juvenile Court Act, broadcasts to the world the evidence of a crime with which he has never been charged, and reinstate the evils of trying young juveniles on the same basis as adult criminals.

The purpose of juvenile courts must be reiterated here to gain a proper conception of the problem before us. The past several decades have produced a complete change in attitude of the state toward its offending children. The problem of the delinquent child is, in its social significance, of great importance for on its wise solution depends the future of our youth as responsible citizens. The present thinking is that the juvenile who has begun to go wrong, who is incorrigible, who has violated some law or ordinance, is to be taken in hand by the state through a juvenile court, under the doctrine of parens patriae, as a guardian because of the unwillingness or inability of his natural parents to guide him toward responsible citizenship. Legislation establishing juvenile courts and providing methods to deal with dependent, neglected, and delinquent children shows a modern solicitude of the law for the best interests of such children. The juvenile court is not a criminal court; it does not punish for crime. Its purpose is corrective and reformative, and its ultimate purpose by its procedures is to permit the juvenile judge to best guide and control juvenile wrongdoers, with more consideration for the future development than for their past shortcomings. The creation of such courts has been characterized as the most outstanding development in the administration of criminal justice since the signing of the

Magna Carta. 31 Am. Jur., Juvenile Courts, Etc., ss. 2 and 5, pp. 296, 297.

It is contended by the petitioner that a contrary view is required by the case of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, and the asserted judicial history of that case. It is in the consideration of this issue where I must part company with the petitioner's contention.

No fault can be found with the granting of the writ of habeas corpus for failure to comply with conventional due process, i.e., the insufficiency of the petition in charging delinquency; the failure to give notice and hearing, and matters of that nature. The issue here is whether or not juvenile acts which have been held constitutional in some 40 states in fact violate constitutional due process under the Fourteenth Amendment to the Constitution of the United States. I concede that the provisions of state juvenile acts must be complied with in accordance with their terms. The issue here does not involve any alleged failures in this respect. It may be true, and it probable is, that errors have been made by juvenile courts, but this is a condemnation of personnel and not the procedures that would justify a holding of unconstitutionality. If error in administration is a basis of a holding of unconstitutionality there would be few statutes which would escape. But the right of review for the correction of errors exists in this state and adequately protects against the ruthless administration of the act which the Gault opinion asserts as existing. The Gault opinion attacks the statutory efforts to conceal the deviational behavior of wayward juveniles as being "more rhetoric than reality." It questions the trial before a juvenile judge in affording due process by stating that "the condition of being a boy does not justify a kangaroo court," an implied criticism of juvenile judges that is wholly unwarranted. In the Gault case, the petitioner was a 15-year-old boy. The opinion indicates that the primary ground in finding him to be delinquent was the use of vile and lewd statements over a telephone, a misdemeanor for which, if convicted, would carry a penalty of $5 to $50 fine or a jail sentence for not more than 2 months. It is then asserted that under the

juvenile act he was committed to custody for a maximum of 6 years. The comparison is simply not true, unless he failue to accept correction and continues as an incorrigible juvenile. The opinion plainly states that the rights of an adult under a criminal charge exceed those of a juvenile delinquent, but here the juvenile was not charged with crime. It is completely overlooked, however, that the juvenile received many advantages because of his youth that the criminal juvenile or adult does not possess, which is the very purpose of the Juvenile Court Act. In fact, the requirement of a jury trial defeats the very purpose of the act.

But irrespective of the foregoing, the Gault case does not hold or even infer that a jury trial is essential to due process in a delinquency case, even where the supporting evidence points to criminal conduct on the part of the juvenile. The most that is said by Gault with reference to a jury trial being essential to due process in a delinquency case is the following: "From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury." This latter statement is supported by Kent v. United States, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84, wherein it is said: "Because the State is supposed to proceed in respect of the child as parens patriae and not as adversary, courts have relied on the premise that the proceedings are 'civil' in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment. For example, it has been held that he is not entitled to bail; to indictment by grand jury; to a speedy and public trial; to trial by jury; to immunity against self-incrimination; to confrontation of his accusers; and in some jurisdictions * * * that he is not entitled to counsel * * *. This concern, however, does not induce

us in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, *and we go no further.*" (Italics supplied.)

There is no holding by the Supreme Court of the United States that due process requires a jury trial in a delinquency proceeding under a juvenile court act. Three state Supreme Courts have passed on the issue since Gault and Kent. Some reference is made to Duncan v. Louisiana, —— U.S. ——, 88 S. Ct. 1444, —— L. Ed. 2d ——, but this case is a criminal appeal in which the question of delinquency under a juvenile court act is not involved. In Peyton v. Nord, 78 N. M. 717, 437 P. 2d 716 (1968), the court held that a jury trial was required under the provisions of the state statute, and is therefore not pertinent here.

In Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A. 2d 9 (1967), in dealing with the very question, that court said: "In summary, we are in full agreement with the holding of the Supreme Court that the constitutional safeguards of the Fourteenth Amendment guaranteed to adults must similarly be accorded juveniles. It is inconceivable to us, however, that our highest Court attempted, through Gault, to undermine the basic philosophy, idealism and purposes of the juvenile court. We believe that the Supreme Court did not lose sight of the humane and beneficial elements of the juvenile court system; it did not ignore the need for each judge to determine the action appropriate in each individual case; it did not intend to convert the juvenile court into a criminal court for young people. Rather, we find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques. The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner,

and would result in a sterile procedure which could not vary to meet the needs of delinquent children. Accordingly, we reject appellant's request for a jury trial."

In Estes v. Superior Court, 73 Wash. 2d 272, 438 P. 2d 205 (1968), the court, in declining to construe Gault as requiring a jury trial in a dependency case, said: "While recognizing that in the instant case the above-mentioned requirements were met, and further that Gault did not specifically determine that jury trials are required in juvenile proceedings, petitioner nevertheless argues that, under the reasoning of Gault, a juvenile acused of an act which could lead to his institutionalization is entitled to the same procedural and constitutional rights as an adult accused of a crime, which rights would include a jury trial. * * * We do not believe that the Supreme Court's opinion in Gault, supra, is to be considered as a mandate to abandon this beneficial concept of the juvenile court system. Rather, it is a direction that the juvenile be offered the benefits of an informal hearing at which rules of fairness and basic procedural rights are observed. Such results can be obtained without the formality of a jury trial. One of the substantial benefits of the juvenile process is a private, informal hearing conducted outside the presence of a jury."

Summarizing my position, the Supreme Court of the United States has never held that a jury trial is essential to due process in a delinquency proceeding under a juvenile court act. Two state Supreme Courts have held that a jury trial is not required in such cases and that Gault and Kent do not hold otherwise. Since 1905, when our first Juvenile Court Act was enacted, this court has consistently held to the constitutional validity of our Juvenile Court Act including the provisions for a nonjury trial. There is no case authority holding that a jury trial is a requirement of due process in a deliquency proceeding.

The purport of the petitioner's position is that a jury trial is required by the holdings of the Supreme Court of the United States. But that court has not so held. To hold that it has, under such circumstances, has the effect of overruling the previous holdings of this court without making reference to them and without regard to the fact that the two state Supreme Courts passing on the issue

since Gault have determined that the Gault case does not hold that a jury trial is required in a delinquency case under the due process clause of the Fourteenth Amendment to the federal Constitution. An opinion to the contrary would be supported only by its own rhetoric. Such a holding can be based only on the assumption that the United States Supreme Court will eventually hold that a jury trial in juvenile delinquency cases is required to afford due process. To this I do not subscribe since that court, with opportunities to do so before it, has declined to so hold. Agreeing with what that court may or may not do affords no basis under the rule of federal judicial supremacy to hold an otherwise valid act invalid by an less authority than peering into a crystal ball. In this process, the Juvenile Court Act, a legislative act which has been characterized as the most outstanding improvement in the administration of the affairs of delinquent juveniles in the last century, is held to effect is unconstitutional.

It is the function of this court to protect its own jurisdiction against encroachment. It is my firm opinion that this court ought not to yield up its own powers to the Supreme Court of the United States until such court has made a final and binding judgment that can be imposed on this court under the doctrine of judicial supremacy. If and when such a judgment is rendered by the Supreme Court of the United States, this court ought and will alter its position to comply therewith however much it may disagree with its soundness. But in the absence of a holding of unconstitutionality under the federal Constitution, this court is not bound by the rule of judicial supremacy, nor should it be voluntarily accepted in view of our own statute and the rule of judgment in this and other states upholding its constitutional validity.

I am not certain I am not in accordance that [illegible] and human spirit in the [illegible] of the juvenile court act existing in most of the states of the union. This court has [illegible] on statements in dicta opinions to the effect that a finding of delinquency [illegible] affect a conviction for crime, [illegible] to the criminal proceedings in favor of a civil protective proceeding, and to be "more rhetoric than reality". It is noted that the process is not provided for stating that "the condition of being a boy does not justify a hangover court", and that

juveniles are denied rights in criminal cases that are afforded to adults. I submit that a close examination of the situation reveals that these assertions simply are not true. The Supreme Court of the United States appears to be pointing toward a declaration of the unconstitutionality of the beneficient provisions of most juvenile court statutes. It appears willing to ignore the consistent holdings of constitutionality by state and federal courts over the past few decades and thereby rejects all the logic and reasoning supporting these holdings. It appears to take the position that its wisdom in this area exceeds in quality all the judicial pronouncements before it in the field of juvenile delinquency. The fact that a judge is a member of the highest court of the nation or State is not of itself proof of infallibility of decision. It might be well for members of such courts, on occasion, to step down from their ivory towers and recall with some humility that they were at the time of their appointment better than average lawyers with little judicial experience, of which there are many, who knew a President or Governor. In drafting the Constitution of the United States, our forefathers did not provide the states with a practical means of combating misconstruction of the Constitution or the encroachment of federal authority upon the sovereign power of the states. As I have before stated, it is the duty of this court to defend its own jurisdiction. The power of the pen is the only remedy left to us. When and if a decision of the Supreme Court of the United States holds the Juvenile Court Act of this state to be unconstitutional under the federal Constitution I want to make it clear that I shall recognize the power of that court to do so under the doctrine of judicial supremacy, but with the reservation of the right to protest its right to do so. But I shall neither bend the knee nor bow the head in mere interpretations, speculations, or probabilities as to what that court will eventually do. Clear and plain holdings of unconstitutionality alone require us to apply the doctrine of judicial supremacy to the holdings of the Supreme Court of the United States. Having these views, which I deem applicable to the case at bar, I concur in the affirmance of the judgment of the trial court.

SPENCER, J., joined by SMITH, J.

I am impelled to suggest that Judge Carter's opinion too casually brushes aside the impact of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, particularly when read in conjunction with Duncan v. Louisiana, ——— U. S. ———, 88 S. Ct. 1444, ——— L. Ed. 2d ———, which defined a misdemeanor punishable by 2 years imprisonment as a serious crime requiring a jury trial.

It is true we have previously said that a finding of delinquency is not punishment for a crime. However, the United States Supreme Court has questioned this legalistic fiction where constitutional rights are directly presented. It is the substance and not the form which will control.

Petitioner, who was 17 years of age, was charged with being a juvenile delinquent because of an alleged violation of the criminal law. He was found delinquent and was committed to the Boys' Training School at Kearney, where he may be confined until he becomes 21, and from which before that time he may be transferred to the Nebraska Penal and Correctional Complex. Our law authorizes the court to commit a delinquent child to the custody of the Department of Public Institutions. S. 43-210, R. S. Supp., 1967. If he had been a few months older, or 18 rather than 17, he could not have been charged as a juvenile, and without question would have been entitled to all constitutional safeguards.

I concede that In re Gault, *supra*, did not specifically pass upon the right to a trial by jury in a juvenile case, but do suggest it does conclude that the doctrine of parens patriae, which for years has been invoked to justify fewer constitutional safeguards for children, must be discarded.

The following quotations from In re Gault, *supra*, indicate that the conclusion supported by a majority of the court is the only one possible under the circumstances:

"Mr. Justice Douglas said: 'Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.' To the same effect is Gallegos v. Colorado, 370 U. S. 49 (1962). Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the

Fourteenth Amendment nor the Bill of Rights is for adults alone. * * *

"* * * the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. * * *

"The juvenile offender is now classed as a 'delinquent.' * * *. It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults. * * *

"It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with white-washed walls, regimented routine and institutional laws. . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. * * *

"* * *. juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even an assurance that the juvenile will be kept in separate institutions, apart from adult 'criminals.' In those States juveniles may be placed in or transferred to adult penal institutions after having been found 'delinquent' by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'"

With a background of several years' experience in juvenile matters, I can appreciate the position of the many conscientious experts on juvenile problems who be-

lieve that it is to the best interests of the child that a public trial, with all its connotes, be avoided, and that the case of the juvenile be processed as informally as possible. Yet, I am persuaded that it is my duty to keep ever in mind that a child, as well as an adult, is entitled to all constitutional protections and that his rights cannot be determined by the criterion of what I may feel is best for him. The decision on the question of a waiver of his constitutional rights is a decision that must be made for him by his legal representative.

SUPREME COURT OF THE UNITED STATES

No. 662, October Term, 1968

CLARENCE DEBACKER, APPELLANT

v.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska

APPEAL from the Supreme Court of the State of Nebraska

ORDER NOTING PROBABLE JURISDICTION

February 24, 1969

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

SUPREME COURT OF THE UNITED STATES

No. 662, October Term, 1968

CLARENCE DEBACKER, APPELLANT

v.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

March 24, 1969

UPON CONSIDERATION of the motion of the appellant for leave to proceed further herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.